COMMON LAW STRICT LIABILITY FOR ENVIRONMENTAL POLLUTION AND DAMAGES

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I. INTRODUCTION

The concept of liability or liability without fault has on accasion been used by Courts in Canada in dealing with environmental protection problems. It has been used more frequently in the United States, and it is applied in both criminal cases and civil cases. In criminal law, for example, offences sometimes do not require any specific or general *mens rea*. The conduct itself, even if innocently engaged in, results in criminal liability. Because of the harshness of holding people strictly liable in this way, the Courts require strong evidence of a legislatif intent to statutorily creat strict liability before the usual requirement of *mens rea* is abandoned. Strict liability crimes are usually limited to minor offences or regulatory offences.[1] They are not criminal in any real sense, but are prohibited in the public interest.[2] Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences have a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have limited application.[3] Typical examples of this type of offence are Violation of liquor laws, product liability laws and environmental protection laws.

In civil law, it is often the case that one who engages in an activity that has an inherent risk of injury, i.e. nonnatural, ultrahazardous, abnormally dangerous activity, is liable for all injuries proximately caused by his enterprise, even without a showing of negligence.[4] The concept of strict liability applied by the Courts here is based on the theory of *Ryland V. Fletcher* and the Restatement of Tort (second) sections 519 and 520.[5] This concept is

1. Law Reform Commission of Canada, Studies on Strict Liability p. 161 (1974)
2. *R.V. Sault Ste Marie* (1978), 21 N.R. 293 (S.C.C.) pp. 384-401.
3. Ibid
4. G. Fridman, Intoduction to the Law of Torts (1978) p. 53.
5. Note, Strict Liability for Generator, Transporters, and Disposers of Hazardous wastes, 64 Minnesota Law Review, pp. 967-979 (1980).

put into practice in the remedies of both statutory and common law.

The following chapters will discuss arguments for and against strict liability, criminal law strict liability, strict liability of common law and defences to strict liability.

II. ARGUMENTS FOR AND AGAINST STRICT LIABILITY

In regulatory offences, the imposition of strict liability is favoured by some scholars on the ground that it can promote higher standards of honesty in commerce and advertising, as well as higher standards of respect for the need to preserve the environment and to manage its resources.[6] Besides the protection of social interests, administrative efficiency and the absence of stigma in it are used to justify the concept.[7] In civil law, strict liability is essentially supported to promote economic efficiency for various reasons,[8] *inter alia:* (1) To serve as a governmentally-imposed system of insurance in circumstances where the harm caused pollution civtims needs to be spread among all of the consumers of a polluting enterprise's products. (2) To achieve global efficiency in cercumtances where pollution costs need to be reflected in product prices. (3) To serve as dynamic incentives for development of economically superior technologies, because there is an assumption that damages liability will not cause a polluter to change its present behavior if it is operating at or beyond the efficient level of control, given current control technology. Therefore strict liability will stimulate the polluter to develop environmentally superior technologies that permit a greater level of pollution control at a lesser cost if there is the prospect of repeated damage payments. (4) It is required by principle of just compensation that are quite independent of economic efficiency. It is said that we might be willing to permit a polluter to continue an activity that causes harm to other when the total benefits exceed the total costs associated with cleaning up that activity. (5) To ease the judicial burden, because it is said that the imposition of damage liability with fault avoids the transaction cost in determining fault. Therefore Court can simply award damages in all cases.

Conversely, arguments advanced against strict liability say that the imposition of liability in regulatory offence is irrational or unjust. Irrational it is sometimes claimed to be, because it involves trying to deter what can not always be detered. Reasonably unavoidable ignorance and mistake, which is all the faultless offender is quilty of, *ex hypothesi* can not always be avoided or deterred.[9] Therefore, the argument

6. Supra note 1 p 32.
7. Supra note 2 p 389.
8. Steward R.B. & Krier J.E., Environmental Law and Policy (1978) pp. 226-233.

in favour of strict liability is unconvincing. Deterence looks beyond the offender in Court, it looks to all the potential offenders outside. But while no one can be detered from making unavoidable mistakes, a penalty imposed on those who make them can strengthen the whole system of deterrents, close possible loopholes through which defendant might escape, and encourage everyone to take the utmost care. If even blameless offenders do not escape, there is all the more reason for everyone else to take more care. Strict liability can serve a utilitarian purpose, and it is not all irrational.[10] But is it unjust? In theory, perhaps not in one sense, at least not in the way strict liability would be unjust in real crimes where bringing a wrongdoer to justice is the aim, because here strict liability would expose a man to condemnation, stigma, shame, and punishment (in the full sense of a penalty deserved by the accused) are out of Court.[11] The penalty is not so much a punishment as a disincentive, so we can not object that defendants are receiving blame or punishment beyond their due.[12] Thefore, in theory, no question should arise of imposing unfair or unjust burdens.

Unfortunately, it appears to be different in practice. First, conviction for regulatory offences may carry a stigma. Second, penalties may be looked upon as more that simple disincentives; they may be thought of as deserved. What is more, the possible penalty allowed by law is frequently imprisonment.[13] According to the estimates of the Law Reform Commission of Canada, it is a legal possibility in over 70% of strict liability offences. Not surprisingly, the social consequences of conviction and punishment for such offences can be quite severe, including loss of job and loss of reputation.[14] Even without imprisonment, the penalties for regulatory offences can be harsh enough. Loss of licence, with resulting loss of livehood, can sometimes be far more severe than imprisonment itself. Thus, for example, a man convicted without fault of a strict liability polluting offence can lose his licence and job.

Quite apart from this, strict liability in the law of regulatory offences is unjust in the second sense considerealier. Even with the aim of mere deterence, it still offends against the principle that like cases should be treated alike and different ones differently. To treat alike one who is at fault and one who is not at fault is to disregard an important distinction: the two are not in the same category, nor should the law act as if

9. Supra note 1 p. 22.
10. Ibid
11. Ibid
12. Ibid

13. Ibid p. 23.
14. Ibid

the were. In doing so, strict liability is unjust.[15]

Some argue that strict liability in regulatory offences is inhuman because it involves treating persons as things. Can this argument be accepted? In one sense, no, not in the way that the entire abandonment of *mens rea* in real crimes would be inhuman, since that would entail denying personel responsibility altogether. With strict liability in regulatory offences personal responsibility is not wholly denied. Indeed, so long as *mens rea* remains the underlying doctrine of the criminal law, far from denying the offender's responsibility, it pay him too great a compliment. It does not only treat him as a responsible person, but it holds him responsible when he really is not. It treats him as more responsible than he really is. Besides, if punishment is fine, the very paradigm of deterrence and of making crime "an ill bargain" to the offender, the law pay him the further compliment of regarding him as a deterrable and thus responsible person. It looks on him not as an object to be cured but as a person to be deterred. The argument from "inhumanity", so crucial in the major criminal law, has here no force.[16]

Other advance objections on the ground of liberty. Can these be raised? Of course they can, because a law that imposes penalties but dispenses with *mens rea* makes individuals act at their own peril. For example, sell food, and you risk paying a penalty for its adulteration even incases where you could not reasonably have known the food had anything wrong with it. This quite simply reduces the extent to which inviduals can predict and avoid the intervention of the criminal law. But the gain in terms of prevention of harm, promotion of high standard of care, and protection of the protection of the public welfare may well outweigh this loss.[17]

This is inlike strict liability in civil law or tort law which no one seems to regard as unjust.[18] This branch of law takes the view that a person who undertakes an abnormally dangerous activity is liable if the activity causes injury to other people, eventhough it was not his fault. He is, after all, the one who had the choice. He need not have undertaken the dangerous objects on his land and expose others to the risk. No one is forced to undertake a dangerous activity or keep dangerous objects. Onyone carrying on an activity likely to result in harm to others will pursue that activity at his own peril. Therefore, strict liability can be just.[19]

But this is quite different from criminal law, for civil law is con-

15. Ibid
16. Ibid p. 21.

17. Ibid p. 23.
18. Ibid p. 22.
19. Ibid p. 24.

cerned with shifting the loss, in money terms at least, from the innocent victim to the man who brought about the dangerous situation, from the plaintiff to the defandant. The latter can of course insure against the loss, make it a cost of the enterprise and pass it on to his customers, the public. So ultimately the loss, instead of being borne wholly by one unfortunate victim, is spread among us all. The criminal law, by contrast, is concerned not with shifting the loss, but with punishing and deterring. The fine does not go to compensate victims or potential victims; it is imposed in order to deter. Besides, insofa as the fine is treated as a cost of the business and passed on to public, this means that the public foot the bill for a fine to be paid to public, to say the least, an odd situation. Thus strict liability in crrminal law can not be justified ont he same grounds as in civil law.[21)]

In fact, what strict liability in criminal law provides is that anyone entering into activity likely to result in harm to others will pursue that activity at his own peril. Again, this make good sense in civil law. Keep a zoo, manufacture fireworks and so forth, and we know that people may get injured as a result. Therefore, it is only right that you should have to compensate them if they do; this is a fair risk of trade. Does this same principle make sense in criminal law? To do so it would have to ensure that we stand to gain thereby. One gain could be to ensure that those who cause harm to others, even innocently, should compensate those others, but this taken care of by civil law. Another gain would be to discourage the activity in question without going so far as to prohibit it.[22)]

Other arguments advanced against strict liability are based on certain theories, *inter alia:* Contributory negligence and assumption of risk theories. The contributory negligence theory objects to the imposition of strict liability in a case where damages suffered by a plaintiff were not only caused by the defendant's conduct but also by the plaintiff's contributory negligence. Contributory negligence is defined as conduct by the plaintiff which falls below the standard to which he should conform for his own protection.[23)] The assumption of risk theory justifies strict liability with tow limits. The first limit is usually put in terms of whether the injury stemmed from the risk the presence of which was the reason for making the activity strictly liable. The second limit is usually put in terms of whether the victim has done something which, though not necessarily negligent, has especially exposed him to the risk.[24)]

Stewart and Krier, by using an economic efficiency analysis, put pollution or other forms of environmental degradation incertain circumstancesd: (1) The plaintiff can more cheaply reduce pollution damages. In this case, requiring the defendant, either under the rubric of strict liability or fault, to compensate the plaintiff for the full amount of unavoided damage, could reduce or destroy the plaintiff's incentiff to take avoidance measures that are socially desirable. (2) The local community gains external benefits from the activity, such as providing employment when there is a slack in the economy, eventhough the activity gives rise to pollution and other forms of external costs. Imposition of damage liability may cause a pollution source to shut down or reduce its level of activity. If there were no external benefits associated with such activity, shut down in the face of damage liability would ordinarily be desirable. But where external benefits are created by the activity, shut down may not socially desirable. (3) Coming to the nuisance. In this case, the plaintiff with full notice subjects himself to the risk. This is actually a variation of the principle of assumption of risk or *Volenti non fit injuria.*[25)]

III. CRIMINAL LAW STRICT LIABILITY

In criminal law, offences are traditionally divided into two catagories, the true criminal offence and the public welfare offence. The distinction between these two is very important, because if the offence is a criminal one, the prosecution must prove a mental element, namely, that the accused who commited the prohibited act did so intentionally or recklessly, with knowledge of the facts which constitute the offence, or with willful blindness towards them.[26)] Mere negligence is excluded from the concept of the mental element required for conviction, with the result that a person who fails to take such precautions as a reasonable and prudent person would take, or who fails to know facts he should have known, is innocent in the eyes of the laws.[27)] If the offence is one concerning the public welfare, there are two possibility. (1) The prohibited act which constitutes the actus reus of the offence. It is not relevant to prove a mental element, and it is no defence to prove that the accused was entirely without fault, in other words, it is not open to the accused to free himself by showing that he was free of fault. This kind of offence is called an offence of ab-

20. Ibid p. 25.
21. Ibid
22. Ibid
23. Supra note p. 229.
24. Calabresi G. & Hirchoff J.T. Toward a Test for Strict Liability in Tort, 81 Yale L.J. (1972) pp. 1055-1084.
25. Supra note 8 p. 232.
26. Avins, Absolute Liability for Oil Spillage, 36 Brooklyn L. Rev. (1978).
27. Supra note 1 p. 227.

solute liability.[28] (2) It is not necessary for the prosecution to prove the existence of *mens rea,* the commission of the prohibited act *prima facie* resulting in the offence. This gives the accused an opportunity to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the same circumstances. A defence is also possible if the accused reasonably but mistakenly believed in certain facts which, if they had been true, would have made the act or omission innocent, as if he had taken all reasonable steps to avoid the particular event. This kind of offence is called an offence of strict liability.[29]

Various arguments are advanced in justification of absolute liability in publict welfare offences. Two predominate. First, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain persuits and that such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistakes will not excuse them. The removal of any possible loophole acts, it is said, is necessary as an incentive to take precautionary measures beyond what would otherwise be taken, in order that mistakes and mishaps be avoided. The second main argument is one based on administrative efficiency. With regards to both the difficulty of proving mental culpability and the number of slight cases. Which daily come before the Courts, proof of fault each person's fault consumes a lot of time and money. To require proof of each person's fault would give ample opportunity to each violator to escape. This, together with other work entailed in proving *mens rea* in each case would impede adequate enforcement to the point of virtually nullifing the regulatory statutes. In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation, and the social ends to be achieved are of such importance as to override the unfortunate by product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with contion for a criminal offence.[30]

Arguments of stronger force are advanced against absolute liability. The most telling is that it violates fundamental principle of penal liability. It also rest on assumptions which have not been, and can not

28. Law Reform Commission of Canada, Crimes against the Environment p. 30 (1985).
29. Ibid.
30. Supra note 2 p. 389.

be, emperically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, he is not likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach. If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may downplay it, the opporbrium of conviction. It is not suffient to say that the public interest is engaged and, therefore, liability may be imposed without fault. In serious crimes, the public interest is involved and *mens rea* must be proven. The administrative argument has little force as well. In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt.[31] It is worth noting that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interest of health and safety was minor. To day, such penalties may amount to thousands of dollars and entail the possibility of imprisonment for a second conviction.[32]

It is interesting to notice the recommendation made by the Law Reform Commission of Canada to the Ministry of Justice. It was stated that negligence should be the minimum standard of liability in regulatory offences, that such offences were:

> to promote higher standards of care in business, trade and industry, higher standards of respect for the environment and (therefore) the offence is basically and typically an offence of negligence,[33]

that an accused should never be convicted of a regulatory offence if he can prove that he acted with due diligence, meaning that he was not negligent.

What about pollution offences: are they true criminal offences? Pollution offences are undoubtedly public welfare offences enacted in the interests of public health. Thus, there is no presumption of full *mens rea.*[34] Furthtermore Spraque J., in *R.V. Industrial Tankers* Ltd. held:

> the crown did not need to prove that the accused's *mens rea,* but it did have to show that the accused had the power and authority to prevent the pollution, and could have prevented it, but did not do

31. Ibid.
32. Ibid.
33. Ibid 395.
34. *Chasemors V. Richards* (1859).7 H.L.C. 349 at p. 382.

so. Liability rest upon control and opportunity to prevent, i.e. that the accused could have and should have prevented the pollution.[35]

In *Sault Ste Marie,* Mr. Justice Dickson says:

public welfare offences, within which category pollution offences fall, are offences of strict liability in which there is no necesssity for the prosecution to prove the existence of *mens rea.* The commission of the prohibited act *prima facie* import the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. A defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would cause the act or omission to be innocent, or if he took all reasonable steps to avoid the particular event.[36]

IV. STRICT LIABILITY OF COMMON LAW.

As mentioned above, common law has also developed two theories which are used by Courts to impose strict liability on defendants whose activities cause harm to the environment. They are the *Ryland V. Fletcher* theory and Restatement of Torts (second) sections 519 and 520 theory.

1. *Ryland V. Fletcher theory.*

In this wellknown case, the defendants for their own purposes and their own advantage constructed a reservoir on their land. The water broke through into the unused and fill-ed-up shaft of an abandoned coal mine and flooded along communicating passages into the adjoining mine of the plaintiff, caussing damage. The actual work was done by independent contractors, who certainly were negligent, but according to English law at that time, their negligence was not chargeable against the defendants, who were entirely free from fault of their own.[37] The case at that time was considered to be unresolvable as a trespass, because the flooding was not direct and immediate, nor as a nuisance, because the defendant's conduct was not offensive to the senses and the damage was non-recurring.[38] In the otherways, the defendants were held liable.[39] In determining the lability of the defendants, two notions were used. They were Mr. Justice Blackburn's notion of a thing "likely to do mischief if it escapes" and Mr. Justice Lord Cairn's niton of a "non-natural use".[40] These two notions developed through subsequent decisions in the English Courts and were

35. *R.V. Industrial Tankers Ltd.* (1968) 4. C.C.C. 81.
36. Supra note 2 p. 398.
37. Prosser W.L. Nuisance without fault, 20 Texas Law Rev.p. 401 (1942).
38. Rodger W.H. Environmental Law, St. Paul Minn West Publishing Co., p. 158 (1977).
39. Supra note 21 p. 402.
40. Katz, Milton. The Function of Tort Liability in Technology assesment, 30 Cincinnati Law Review. p. 643 (1969).

reborn in another form. They became part of the criteria by which it is determined whether an activity is abnormally dangerous.[41]

In Canada, the application of the *Rylands V. Fletcher* principle does not appear to be limited to damage caused by things inherently dangerous.[42] Liability has been found in respect to wide range of substances and activities including gas, oil, sewage, vibration, water, herbicide, insecticide, acidic air contaminants and notious fumes.[43] The criterion appears to be whether in the particular circumtances escape resulting in undue risk of damage to other persons is reasonably likely.[44] An escape from property is not strictly required. Such a case can be seen in *Wild V. Allied Tiling and Floors Ltd.* A subcontractor on the plaintiff's house under construction was held liable for damage caused by the accidental explosion of a propane gas heater brought onto the premises by the defendant.[45] Liability has also been found with respect to damage caused by shock and vibration resulting from controlled blasting,[46] an instance where it would be difficult to say that things are escaping. Proof of an escape often presents little difficulty in the case of environmentally damaging activities that involve discharge of some contaminant into land, air and water. However, escape has been narrowly defined to exclude vibrations caused by pile driving.[47]

It is now settled that the term a non-natural use of land does not refer to the degree of land "development", and should not be given an agricultural connotation.[48] The issue is best put in terms of the method of use, rather than the objective of the activity.[49] Special uses resulting in increased risk of harm to others have been held to be non-natural.[50] Conversely, ordinary domestic or commercial installations such as water, gas or electrical systems and materials storage and distribution systems that can be regarded as "reasonable and ordinary use of premises" have been held to be natural.[51]

Several cases suggest that a use is more likely to be regarded as natural where the object is to benefit the

41. Ibid.
42. Franson & Lucas, Environmental Law Commentary And Case Digests p. 365 (1978).
43. Ibid p. 366.
44. Ibid.
45. *Wild V. Allied Tiling & Floor Ltd (1966),* W.W.R. (Sask).
46. *Himmelman V. Nova Const, Co. Ltd. (1969).* 5.D.L.R. (sd) 56 at 65. 66 (NS).
47. Supra note 42 p. 366.
48. *Mihalchuck V. Rathe; Kwasnuik V. Rathe* (1966), 55 W.W.R. at 558 (Sask).
49. Ibid.
50. *Heintzman & Co. V. Niessen Et al* (1977) 2 W.W.R. 481 (Man Q.B.).
51. *O'Neill V. Esquire Hotels* (1972, 30 D.L.R (sd) 589 (N.B.C.A.): *Brewer V. Kayes* (1973), 33 D.L.R. (3) 532 at 535 (Ont.Dst.Ct.).

public[52] or at least a fairly extensive group of persons.[53] But community benefit has also been specifically rejected. The result is that the *Ryland V. Fletcher* principle may be unavoidable in private environment protections involving damage resulting from the operating processes of ordinary, apparently "reasonable" commercial and industrial activities.[55]

In the U.S., despite initial judicial hostility, most states now accept some form of the **Ryland V. Fletcher** rule.[56] But the use of the doctrine in the harzadous waste context is limited by the requirement that the activity involved by non-natural.[57] In pollution suits, Courts are always reluctant to declare polluting industrial activities in industrial area "non-natural.[58] The Texas Supreme court's decision in *Tuner V. Big lake oil co.* is typical. It stated that oil drilling was not a non-natural use of land in Texas, and refuse to impose strict liability for damage caused by the escape of salt water wastes from oil drilling operations. The court also noted, however, that Texas does not impose strict liability for other activities almost universally classified as non-natural, because such liability is unsuited to their conditions.[59]

The Delaware Supreme court, in *Fritz V. E.I. Du Pont de Nemours and Co.*, applied a rationale similar to that in the above mentioned case to the chemical industry. In this case, the court also refused to hold Do Pont strictly liable for an employee's permanent injuries caused by an escape of chlorine gas, because, according to the court, to say that any corporation or individual possessing or using dangerous substances upon its or his premises should be held liable as an insurer in the event to injury to other by reason of the mere possession, use, or escape there of would be but to strangle corporate and individual enterpire.[60] However, the court's decision did not entirely hinder the application of strict liability to practices that have a "history of doing injury to others or their property.[61] Thus, a court could expand strict liability to include hazardous waste disposal if a plaintiff provided a carefull documented history of injury connected with the disporal of

52. *Pea Grower Ltd V. Portage La Prairie* (1963), 45 W.W.R. 513.
53. Supra note 51.
54. Supra note 52.
55. Ibid.
56. Prosser, Hanbook of the law of Tort Section 13.p.63 (1971).
57. Maloney, Judicial Protection of the Environment: A New Role for Common Law remedies, 25 Vand.L. Rev. 145, 150 (1971).
58. Supra note 5 p. 970.
59. *128 Tex. 155, 96 S.W. 2d.221* (1936) see Rodgers - supra note 38.
60. 45 Del. 427, 75 A. 2d 256 (1950) see supra note 5.
61. Ibid.

the particular hazardous waste involved.[62]

In *Cities Service Co. V. state case,* a Florida court held a mining company strictly liable when a phosphate slime reservoir broke and allowed approximately one billion gallons of slime to escape. Although the court recognized that the area was suited to mining, that mining had great economic importance to the area, and that Cities Service had followed accepted mining practices, the court found that Cities Service's mining was a non-natural use of land.[63]

This case in an important precedent for cases in which hazardous wastes are stored either on the generator's premises or in an independent disposer's facility.[64] The court's willingness to classify the storage of phosphate slime as a non-natural use of land, although the mining industry is important to Florida, suggests a new approach in determining what is non-natural. Actually, the court determined the non-natural character of the activity by assessing the size of the risk involved.[65] By using this approach, a court could classify the storage of hazardous wastes in industrial areas as a non-natural use of land if the disposal site is large and the risk it generates is great.[66]

2. *Restatement of Torts (second) sections 519 and 520 theory.*

The Original Restatement of Torts limits liability to "Ultrahazardous activity". Although its criteria derive from *Ryland V. Fletcher,* most commentators view the ulrahazardous activity test as both narrowed because the test require extreme danger, and broader because it ignore the location of the activity.[67] The classification of activity as ultrahazardours under the Restatement is a more mechanical process than used in *Ryland V. Fletcher.* Courts have found strict liability applicable when a specific enterprise causes unusual and unavoidable risk.[68] Activities traditionally included in this caregory are blasting, storing of large quantities of dynamite, keeping of wild animals, flying airplanes and crop dusting.[69] As with these activities, hazardous waste disposal may also result in serious injury despite precaution.

In Restatement (second), the ultrahazardous activity test of the Original Restatement is subtituted with "abnormally dangerous activity".

62. Supra note 5 p. 971.
63. Comment, Strict Liability for Hazardous use of one's land - Impounding phosphate slimes in Reservoir is Non-Natural use of lands-escape of slimes involves doctrine of strict liability - *Cities Service V. State, 4 Fla., Ste U.L. Rev 104 (1976).*
64. *Supra note 5 p. 972.*
65. *Ibid.*
66. *Ibid.*
67. *Supra note 22 p. 161.*
68. *Supra note 5 p. 974.*
69. *Ibid.*

The Restatement (second) enumerates six factors courts should consider in applying the test (of course not all of them must be met). Factor (a), (b) and (d) are similar to factors in the Original Restatement, but the others differ: (a) existence of high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inapproriateness of the activity to the place where its carried on; and (f) entent to which its value to the community is outweighed by its dangerous attribute.[70]

The Restatement (second) imposes strict liability for broader range of activities than does the original Restatement. The Restatement would find defendants liable for activities that create a risk of harm that even utmost care fails to eliminate. The Restatement (second) would impose liability for risk of harm that reasonable care fails to abolish.[71] Another different between the two views is that the Restatement (second) includes a balancing test similar to that used in nuisance theory.[72]

The storage, and sometimes the disposal, of large amounts of toxic waste is an abnormal use of land according to the Restatement (second)[73] The storage and disposal of hazardous waste may create (a) a high degree of risk of harm to the person, land, and chattels of others, (b) a likehood that the resulting harm will be great, (c) an inability to eliminate risk by reasonal care, and (d) an uncommon use of land.[74] Disposal of hazardous wastes may not in all cases, however fulfill the remaining two Restatement (second) criteria: (e) in approriateness to the place where the activity is carried on, and (f) more danger than benefit. The danger from these hazardous waste may be considered to be less important than the economic benefit provided by the industries. The last criteria, however, will be fulfilled in many cases.[75] The inappropriateness criterion displays consideration similar to those established in the "non-natural use" criterion of *Ryland V. Fletcher.*[76] in cases in which a use would be considered non-natural under a *Ryland V. Fletcher* analysis, the use would also probably be considered inappropriate under an abnormal use analysis. The criterion of greater danger than benefit will often be satisfied by showing the serious and widespread consequences of improper disporal of hazardous waste.[77]

70. *Restatement of Torts (second) sections 520 (1976) in The Ryland V. Fletcher* Doctrine in America: Abnormally Dangerous, Ultra-hazardous, or Absolute Nuisance; 99 Ariz st. L.J. p. 101 (1978).
71. Supra note 5 p. 975/
72. Ibid.
73. Supra note 5 p. 975
74. Ibid.
75. Ibid.
76. Ibid.
77. Ibid.

V. DEFENCE TO STRICT LIABILITY

Generally, strict liability means tha it is no defence to say "I did not mean to break the law".[78] Or "I did not know the facts were such as to make my conduct illegal".[79] Strict liability means liability without fault. But this does not mean that in cases in which strict liability is imposed there is no defence at all. Strict liability is never absolute.[80] There must, for example, be proof of *actus reus.* There must be proof of an act, omission, or condition which is entirely beyond the defender's or defendant's control. In their development in pollution cases, defence of due deligence and reasonable mistakes of facts have been accepted by courts. Mr Justice Dickson in the R.V. Sault Ste Marie held:

> in a strict liability offence it is open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumtances. A. devence is possible if the accused reasonably believed in mistaken set of fact which, if true, would have made the act or omission innocent, or if he took all reasonable steps to avoid the particular accident.[83]

In the *R. V. Chapin* he held:

> An accused may absolve himself on proof that he took all the care which a reasonable man might have been expected to take in all the circumstances or, in other words, that he was in no way negligent.[84]

An in *R. V. Byron Creek Colleries ltd,* Mr Justice Provenzano held:

> I have no difficulty whatsoever in concluding that the offence before this court on this appeal is for the same reasons given by Dickson, J, similarly an offence of strict liability. Therefore would be open to the appelant to exculpate itself from liability by showing on a balance of probabilities that it had used all reasonable care in the circumstances.[85]

In civil law, even if a plaintiff can establish the elements necessary under one of the theories of liability for dangerous activities, he may be deniel recovery because of one or more defences, including controbutory negligence, assumption of risk, plaintiff's unusual sensitivity, the defendant's public duty, and intervening acts of third persons, animals, or God.[86] But the use of these defences varies among jurisdic-

78. Supra note 1 p. 161.
79. Ibid.
80. Ibid.
81. Ibid.
82. Supra note 5 p. 979.
83. Supra note 2 p.-
84. *R. V. Chapin (1979)* 26. NR. 289 (S.C.C.).
85. *R. V. Byron Creek Colleriesd Ltd.*
86. Supra note 5 p. 976.

tions.[87] Under the Original Restatement, the defendant's public duty to perform an ultrahazardous activity, the plaintiff's contributory negligent, and the intervening act of third parties, animals or God do not apply.[88] Under the Restatement (second), strict liability is hindered by the defendant's public duty to carry out abnormally dangerous activity, the plaintiff's assumption of risk, his unusual sensitivity, intentional trespass onto the defendant's land, or by act of God. Recovery in strict liability is not hindered, however, by the plaintiff's contributory negligence or the intervening acts of third parties.[89]

VI. CONCLUSION.

Regulatory offence's strict liability used in environmental protection is essentially meant to promote higher standarts of respect for the need to preserve the enrironment and husband its resources,[90] and to achieve administrative efficiency.[91] The use of strict liability in regulatory offences has improved since the *Sault Ste Marie case* (1978) in which defences of due diligence and reasonable mistake of facts were justified by the court.

In civil law, strict liability is applied through the doctrines of Abnormally Dangerous Activity. If the court, as a matter of law, defined a conduct as not only dangerous but also abnormally or unusually risky, a victim could secure relief by merely showing that the actions cause the damage without having to prove as well that the defendant acted unreasonably.[92] The doctrine of strict liability actually has limited value to those who seek environmental protection, since relief in strict liability is on a one to one to one basis, is usually limited to monetary damage and involves the difficult problem of proving causation.[93] The problems of proving causation and securing total relief were especially troublesome when there were multiple causes of a single harm.[94] This situation is created by the fact that many forms of injury have causes other than pollution, and it is often difficult or impossible to establish which among several possible causes were responsible for the illness in a given individual.[95] More importantly, the doctrine still involves balancing as to the utility of the activity. Unlike negligence rules, the balance is not made by the fact finder in deciding whether the defendant acted unreasonably, but rather by

87. Ibid.
88. Ibid.
89. Ibid.
90. Supra note 1 p. 32.
91. Supra note 2 p.-
92. Belsky M.H. Enrivonmental Policy Law in the 1980's, Shifting Back the Burden of Proof, 12 Ecology Law Quaterly (1984) p. 9.
93. Ibid.
94. Ibid.
95. Supra note 103 p. 9.

the judge in deciding whether the activity or condition was abnormally or unusually risky. In developing the standards for abnormally, the court looks to prevailing land use patterns and common usage. The degree of risk, the gravity of harm, and the appropriateness and value of the activity are all to be weighed.[96]

96. Ibid.